

83-194

AUG 26 1982

ALEXANDER L. STEVENS,  
CLERK

No.

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# In the Supreme Court

OF THE

## United States

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OCTOBER TERM, 1982

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MICHAEL BURTON,  
*Plaintiff-Appellant,*

VS.

PACIFIC FAR EAST LINE, INC.,  
*Defendant-Appellee.*

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### RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*Attorneys for Defendant  
Pacific Far East Line, Inc.*

### REASONS FOR DENYING THE PETITION

Petitioner cites *Link v. Wabash Railroad Co.* 370 U.S. 626 (1962) correctly to hold that a Federal Court has undisputed power to dismiss a plaintiff's action with prejudice because of his failure to prosecute. Plaintiff cites two Fifth Circuit Cases, one of which upheld dismissal and another, *Rodgers v. Kroger Co.* 669 F.2d. 317 which reversed a trial court dismissal where both plaintiff and defendant had been guilty of delays and the trial court had *sua sponte* suggested the availability of such a motion which was then made orally and granted by the court.

Plaintiff has cited no authority from any Court of Appeal in any Circuit contra to the holding of the 9th Circuit in this case. The *Rogers* decision (*supra*) on its specific facts, involving mutuality of delay and lack of full consideration by the trial court is not a "conflict" among the Circuits such as to require analysis and resolution by the Supreme Court. The significant number of 2nd Circuit cases such as *Chira v. Lockheed Aircraft Corp.* 634 F.2d. 664 (1980) (6 month inactivity), in substantial accord with the 9th Circuit holding are unmentioned by plaintiff.

The delays in the case at bar are plaintiff's, the prejudice to Defendant is patent, the failure to plead a cause of action over which the District Court would have subject matter jurisdiction is plaintiff's. The *res judicata* and other grounds raised in Defendant's Motion to Dismiss before the District Court and preserved before the Court of Appeals, all support the judgment dismissing plaintiff's last filed complaint.

**CONCLUSION**

Plaintiff has had hearings, rehearing and careful consideration by the Trial and Appellate Courts, the rules have been followed and Plaintiff/Petitioner's application for writ of certiorari should be denied.

Dated: August 11, 1983

Respectfully submitted,

ACRET & PERROCHET

By: G. M. PERROCHET

G. M. PERROCHET

*Attorneys for Defendant*

*Pacific Far East Line, Inc.*

**(Appendices follow)**

**Appendix 1**

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**235-10. Dismissal For Lack of Prosecution.**

Each judge may from time to time notice for hearing on a dismissal calendar such actions or proceedings assigned to that judge which appear not to have been diligently prosecuted. Whenever it appears that plaintiff has failed to prosecute an action or proceeding diligently, the assigned judge may order it dismissed; failure to serve the initial pleading within forty days of filing and, in the absence of an order by the assigned judge setting any date for any pretrial proceeding or for trial, failure by plaintiff to take action for four months shall be presumptive evidence of lack of prosecution. Unless otherwise ordered by the assigned judge, each party shall, not less than ten days prior to the noticed hearing date, serve and file a certificate setting forth the status of the action or proceeding and whether good cause exists to dismiss it for failure to prosecute. Nothing in this Rule shall preclude any party from filing a motion to dismiss an action or proceeding for failure to prosecute under Rule 41(b), Federal Rules of Civil Procedure.

**Appendix 2**

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Law Offices of  
Lyle C. Cavin, Jr.  
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In the United States District Court  
For the Northern District of California

No. C-78-0220 SW

Michael Burton, as personal representative of  
Betty Bughman Burton Williams, deceased,  
Plaintiff,

vs.

Pacific Far East Lines, Inc., a corporation,  
Defendants.

[Filed Mar. 16, 1981]

**FIRST AMENDED COMPLAINT AS OF  
RIGHT PURSUANT TO RULE 15(a)**

Plaintiff complains of defendant Pacific Far East Lines, Inc., and for a First Cause of Action alleges:

1. Jurisdiction of this cause is based on Title 46, United States Code, Section 761 et seq.

2. On July 14, 1977, plaintiff was issued Special Letters of Administration of the estate of Betty Bughman Burton Williams, deceased, by order duly given and made by the Superior Court of the State of California, In and For the City and County of San Francisco, and plaintiff now is the

duly appointed, qualified and acting special administrator of the estate and brings this action on behalf of the heirs of said decedent.

3. The sole surviving heirs at law of Betty Bughman Burton Williams, deceased, are the following:

<u>Name</u>	<u>Relationship to Decedent</u>
Michael Burton	Son
David Burton, Jr.	Son
Henry Burton	Son

4. At all times herein mentioned, defendant Pacific Far East Lines, Inc., was a corporation organized and existing under the laws of the State of California, and authorized to do business in the Northern District of California, was the owner, charterer and manager of the vessel S.S. Monterey, and used said vessel in the transportation of passengers in interstate and foreign maritime commerce.

5. On or about March 15, 1977, plaintiff's decedent was lawfully a passenger for hire aboard the common carrier S.S. Monterey and had paid the compensation required to be paid the defendant for transportation on a 42-day cruise in the South Pacific Ocean.

6. On or about March 15, 1977, defendant and its officers, agents and employees, and passengers under defendant's control and responsibility, did willfully, wantonly and intentionally assault and batter plaintiff's decedent from her peril, resulting in her death on or about March 15, 1977.

7. The body of plaintiff's decedent was never recovered.

8. The death of plaintiff's decedent was caused solely, directly, and proximately by the wrongful acts of defend-

ant, its officers, agents, and employees, and passengers under defendant's responsibility and control, without any negligence on the part of plaintiff's decedent contributing thereto.

9. Betty Bughman Burton Williams was the mother of Michael Burton, David Burton, Jr., and Henry Burton. She was fifty-eight (58) years of age at the time of her death; she helped support said children by providing them with an undetermined sum per month, and by reason of her death they have been deprived of decedent's financial support, all to their loss and damage in a sum to be ascertained.

10. As a direct and proximate cause of the injuries inflicted on her by defendants, its officers, agents and employees, and the passengers under defendants' responsibility and control, and of decedent's death, decedent's heirs have been deprived of the nurture, instruction, and physical, intellectual and moral training of their deceased mother, all to their damage in the amount of \$500,000.00.

11. All of the aforementioned acts of defendant, its officers, agents and employees, and the passengers under its responsibility and control were done and committed and caused by said tortfeasors with malice and ill will and with the intent and design of injuring and oppressing plaintiff's decedent and for that reason plaintiff is entitled to and prays for Five Million Dollars (\$5,000,000.00) exemplary and punitive damages.

Plaintiff complains of defendant, and for a Second Cause of Action alleges:

12. Plaintiff incorporates by reference as though fully set out herein each and every allegation of Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the First Cause of Action.

13. On or about March 15, 1977, defendant and its officers, agents and employees and passengers under defendant's responsibility and control so negligently and carelessly conducted themselves in a fashion so as to cause plaintiff's decedent to be lost overboard, resulting in her death on or about March 15, 1977.

Plaintiff complains of defendant, and for a Third Cause of Action alleges:

14. Plaintiff incorporates by reference as though fully set out herein each and every allegation of Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the First Cause of Action.

15. On or about March 15, 1977, defendant and its officers, agents and employees negligently and carelessly failed to make any attempt to rescue plaintiff's decedent from her peril, resulting in her death on or about March 15, 1977.

16. All of the aforementioned acts of defendant, its officers, agents and employees were done and committed and caused by said tortfeasors with malice and ill will, reckless and wanton disregard for the physical well being of the plaintiff's decedent, with the intent and design of injuring and oppressing plaintiff's decedent and for that reason plaintiff is entitled and prays for Five Million Dollars (\$5,000,000.00) exemplary and punitive damages.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages to decedent's heirs for loss of support.



2. For damages to decedent's heirs for the loss of nurture, instruction, and physical, intellectual and moral training in the amount of \$500,000.00.

3. For punitive and exemplary damages for the First Cause of Action in the sum of Five Million Dollars (\$5,000,000.00).

4. For punitive and exemplary damages for the Third Cause of Action in the sum of Five Million Dollars (\$5,000,000.00).

5. For costs of suit herein; and

6. For such other and further relief as the court deems just and proper.

Dated: 3/13/81

/s/ LYLE C. CAVIN, JR.

Lyle C. Cavin, Jr.

Attorney for Plaintiff

**Appendix 3**

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Attorneys for Defendant

Pacific Far East Line, Inc. and

for Trustee in Bankruptcy of

Pacific Far East Line, Inc.

United States District Court

For the Northern District of California

C 78 0220 SW

Michael Burton, as personal representative of

Betty Bughman Burton Williams, deceased,

Plaintiffs,

vs.

Pacific Far East Lines, Inc., a corporation,

Defendant.

[Filed Mar. 20, 1981]

**ANSWER**

**TO FIRST AMENDED COMPLAINT**

Comes Now Defendant Pacific Far East Line, Inc., a Delaware corporation, erroneously named as Pacific Far East Lines, Inc., a corporation; also properly described as Pacific Far East Line, Inc., a Delaware corporation, Bankrupt; and for response to the Complaint on file herein voluntarily appears and alleges:

1. Admits that this Court's jurisdiction may be founded *only* under the Death on the High Seas Act (DOHSA) 46 USC § 761 et seq.; further answering *suggests* to this Honorable Court that it lacks jurisdiction even under DOHSA, plaintiff having refused to plead the *place* of the alleged wrongs as being upon the high seas, more than a marine league from shore.

2. Defendant is informed by plaintiff's counsel, and believes, and basing its answer on said information and belief admits the allegations of paragraph 2.

3. Defendant is informed by plaintiff's counsel and believes, and basing its answer on said information and belief admits the allegations of paragraph 3.

4. For answer to paragraph 4 alleges that defendant Pacific Far East Line, Inc. was a Delaware corporation, authorized to do business in the Northern District of California and was the owner of the SS Monterey and used said vessel in transportation of passengers in foreign maritime commerce. Except as alleged, denies each and every, all and singular, the allegations of paragraph 4.

5. Denies each and every, all and singular the allegations of paragraph 5.

6. Denies each and every, all and singular the allegations of paragraph 6; further answering alleges that said allegations are unintelligible.

7. Defendant lacks information or belief with respect to the allegations of paragraph 7 and basing its answer on said lack of information or belief denies the allegations of paragraph 7.

8. Denies each and every, all and singular the allegations of paragraph 8.

9. Defendant is informed by plaintiff's counsel and believes that Betty Bughman Burton Williams was the mother of Michael, David and Henry Burton and that she was in March of 1977 fifty-eight (58) years of age and basing its answer on said information and belief admits those allegations of paragraph 9. Except as expressly admitted herein denies each and every, all and singular the remaining allegations of said paragraph 9. Further answering denies that said children were damaged in the sum alleged, or otherwise, or at all; further answering alleges that said children's pecuniary state was enhanced and improved by the demise of decedent if it occurred on or about March 15, 1977 in that said children received money in a greater amount and at an earlier date than they would have if decedent had lived for a longer period of time.

10. Denies each and every, all and singular the allegations of paragraph 10. Further answering denies that plaintiff's decedent was damaged or that decedent's heirs were damaged if the sum alleged, or otherwise, or at all; further answering alleges that the contention and claim of damage for alleged deprivations of decedent's heirs are not cognizable under a claim for damages under DOHSA.

11. Denies each and every, all and singular the allegations of paragraph 11; further answering denies that plaintiff was damaged in the sum alleged, or otherwise or at all, and further answering alleges that the allegations of paragraph 11 as to defendant having committed "acts" with "malice and ill will" and with the intent of "oppressing" plaintiff's decedent are conclusions and are insufficient to

**EIGHTH AFFIRMATIVE DEFENSE** as to all Causes  
of Action:

24. Plaintiff's Complaint should be dismissed in that earlier actions have been filed and dismissed, and other actions based on the same alleged operative facts are now pending before other Courts.

**NINTH AFFIRMATIVE DEFENSE:**

25. Plaintiff's Complaint should be dismissed for failure to serve the Complaint upon defendant within a reasonable time after filing the complaint and causing the summons to be issued on January 30, 1978.

**TENTH AFFIRMATIVE DEFENSE** as to all Causes  
of Action:

26. If Plaintiff's decedent died on or about March 15, 1977 as alleged, or otherwise, plaintiff's own negligence or intentional act or acts which were, jointly or independently the proximate cause of her demise on or about March 15, 1977.

**ELEVENTH AFFIRMATIVE DEFENSE** to all Causes  
of Action:

27. Neither plaintiff nor any member of the class represented by plaintiff suffered any pecuniary loss as a consequence of the demise of plaintiff's decedent.

**TWELFTH AFFIRMATIVE DEFENSE** to all Causes  
of Action:

28. Plaintiff's Complaint is barred by the limitation of time to institute suit contained in the contract for passage, the ticket, between plaintiff's decedent and defendant.

**THIRTEENTH AFFIRMATIVE DEFENSE** to all  
Causes of Action:

29. Plaintiff's Complaint is barred by the limitations period set forth in DOHSA.

Wherefore, defendant asks that plaintiffs' complaint be dismissed, that defendant be awarded its costs of suit and that defendant be afforded such other relief as may be just.

Dated: March 20, 1981

ACRET & PERROCHET

By /s/ G. M. PERROCHET

G. M. PERROCHET